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NO. COA06-904

NORTH CAROLINA COURT OF APPEALS

Filed: 20 March 2007

STATE OF NORTH CAROLINA

v.

MANDESI LAMONT FORTE

Cabarrus County
Nos. 05 CRS 006171
05 CRS 051580

Appeal by defendant from judgment entered 2 February 2006 by Judge Michael E. Beale in Cabarrus County Superior Court. Heard in the Court of Appeals 21 February 2007.

Attorney General Roy Cooper, by Assistant Attorney General John A. Payne, for the State.

Cheshire, Parker, Schneider, Bryan & Vitale, by John Keating Wiles, for defendant-appellant.

TYSON, Judge.

Mandesi Lamont Forte ("defendant") appeals from judgment entered after a jury found him to be guilty of possession of a firearm by a felon. We find no error and remand defendant's motion for appropriate relief.

I. Background

A. State's Evidence

The State's evidence tended to show Elizabeth Trivette ("Trivette") drove from work to her house on Melanie Court in Concord, North Carolina on 30 March 2005. Trivette testified:

I was driving on my way home from work and I noticed some commotion going on to the right side of me when I was driving down the road. And I saw [defendant] on top of the victim and he was holding a pistol in his hand and he was smacking him in the face with it.

The pistol appeared to Trivette to be black in color from the street. Trivette testified the incident occurred during daylight hours on a sunny day and she had a clear view of defendant and the incident with no obstructions. Trivette had never met defendant or had any arguments or altercations with defendant. On cross-examination, Trivette stated the pistol looked at first to her like a BB gun. When asked by defense counsel how she knew it was not a BB gun, Trivette responded, "That's a good question."

Thomas Wallace ("Wallace") lived across the street from where the incident occurred and also witnessed the assault. Wallace testified he saw defendant strike Reginald Gore ("Gore"). Wallace was not sure what defendant used to strike Gore and testified, "I figured in a way it was a pistol, but in a way I couldn't really tell in a way because the sun was behind him. So whatever he pulled up it had a glare to it." Wallace testified defendant had something in his hand, but that he was unsure what it was. Wallace never saw defendant "pull nothing out."

Cabarrus County Deputy Sheriff Wade Gray ("Deputy Gray") also testified at trial. On 30 March 2005, Deputy Gray responded to a radio call from dispatch in reference to a fight. The radio call also provided a description of a vehicle that had left the scene. When Deputy Gray arrived near the scene, he followed and stopped a vehicle that matched the description. Larry Bost ("Bost") was

driving the vehicle and defendant was the passenger. Deputy Gray suspected a weapon might be present in the vehicle. Deputy Gray asked for and received consent to search the vehicle. No weapon was found.

Deputy Gray and several other law enforcement officers attempted to locate a weapon that may have been thrown from the vehicle. Deputy Gray noted an area where the vehicle was out of his line of sight for a few seconds. The officers concentrated their search in that area.

Cabarrus County Deputy Sheriff Teresa Small ("Deputy Small") assisted in the search for the weapon and testified she found a "semiautomatic stainless steel handgun with black grips laying in some ivy on a ledge." The weapon was: (1) found approximately 500 yards from where Deputy Gray stopped Bost's and defendant's vehicle; (2) laying on top of an ivy bed; (3) not dirty; (4) found on the same side of the road as the side defendant was sitting in the vehicle; and (5) not hot to the touch despite being in direct sunlight.

Cabarrus County Deputy Sheriff James Moreau ("Deputy Moreau") testified that unsuccessful attempts were made to recover fingerprints from the weapon. Deputy Moreau also testified Gore was bleeding from his injuries and that defendant's shirt contained blood on it. No blood was found on the ground or objects at the scene of the fight. The handgun recovered was not tested for the presence of blood.

The State also produced evidence defendant had previously been convicted of a felony, i.e. second degree murder.

After the State presented its evidence, defendant moved to dismiss the charge of possession of a firearm by a felon. The trial court denied defendant's motion based upon finding sufficient evidence of each element of the crime.

B. Defendant's Evidence

Defendant did not testify, but presented witness testimony in his defense. Bost testified he drove defendant to where his aunt, Leslie Forte Barrett ("Barrett"), lived. Bost stated, "I didn't see no gun." Upon reaching Barrett's house, defendant got out of the vehicle and Bost drove down the hill to turn around and park the vehicle. Bost stated:

[Defendant] walked down. [Gore] stood up, put his dukes up and he started boxing. And that's when I went down the hill to turn around.

. . . .

[W]hen I was coming back up Mr. Gore was running around the house. [Defendant], then the next thing I know when I got up there [defendant] had him on the ground and they was fighting. I didn't see no gun, period. And that was it. And after his aunt came she said, y'all stop, the police are coming, y'all stop fighting. They stopped. [Defendant] got in the car. We pulled off.

Bost never saw defendant in possession of a gun and never saw defendant throw a gun out of his car window. Bost testified he had known defendant "since he was a little boy."

Barrett, defendant's aunt, also testified for the defense and stated she saw the end of the fight between defendant and Gore.

Barrett and Gore, the victim, were involved in a romantic relationship and engaged to be married. Barrett stated she did not see defendant in possession of a gun on 30 March 2005.

Gore did not testify for the State or defense at trial. At the close of all the evidence, defendant renewed his motion to dismiss the case against him. The trial court denied defendant's motion.

On 2 February 2006, the jury found defendant guilty of possession of a firearm by a convicted felon. Defendant moved to dismiss notwithstanding the verdict because of "the failure of the officer, and hence the State, to disclose a *Brady* material to the defense in its discovery process." The particular *Brady* material to which defendant referred was that "there was a failure to report the fact that they had attempted to obtain fingerprints from this weapon . . . and that they got no results." The trial court denied the motion.

Defendant pled guilty to the charge of being an habitual felon. Defendant was sentenced to a minimum term of 100 months and a maximum term of 129 months imprisonment. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) denying his motion to dismiss at the close of the State's evidence and at the close of all the evidence because the State presented insufficient evidence he possessed a firearm and (2) denying his motion to dismiss notwithstanding the verdict based upon the State's *Brady* violation.

III. Motion to Dismiss

A. Standard of Review

This Court has stated:

The standard of review for a motion to dismiss in a criminal trial is:

Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.

Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. If substantial evidence, whether direct, circumstantial, or both, supports a finding that the offense charged has been committed and that the defendant committed it, the motion to dismiss should be denied and the case goes to the jury. But, if the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed.

In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence. The trial court must also resolve any contradictions in the evidence in the State's favor. The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness's credibility. It is concerned only with the sufficiency of the evidence to carry the case to the jury. Ultimately, the court must decide whether a reasonable inference of defendant's guilt may be drawn from the circumstances.

State v. Ellis, 168 N.C. App. 651, 656-57, 608 S.E.2d 803, 807 (2005) (internal citations and quotations omitted).

B. Analysis

The elements of possession of a firearm by a felon are the defendant: (1) was convicted of a felony and (2) thereafter possessed a firearm. N.C. Gen. Stat. § 14-415.1(a) (2005) ("It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm[.]"). Defendant does not dispute the State satisfied the first element. Defendant argues the trial court erred by denying his motion to dismiss because the State failed to present sufficient evidence to prove he possessed a firearm. We disagree.

Here, Trivette and Wallace testified defendant possessed a firearm during the fight with Gore. Deputy Sheriffs testified to finding a firearm 500 yards from where defendant was apprehended. Defendant argues "only conjecture and suspicion" turned the State's evidence into him possessing a firearm. The State presented both direct and circumstantial evidence tending to show defendant possessed a firearm. *Ellis*, 168 N.C. App. at 656, 608 S.E.2d at 807. The trial court was neither required to weigh the evidence nor determine the witnesses' credibility. *Id.* at 657, 608 S.E.2d at 807. A reasonable inference of defendant's guilt could be drawn from the evidence presented by the State. *Id.* This assignment of error is overruled.

IV. Brady Violation

_____ Defendant argues his due process rights, set forth in *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963), were violated when the State failed to disclose fingerprint testing had been attempted

and was unsuccessful. Defendant had moved to require the State to disclose favorable evidence. We disagree.

Our Supreme Court has stated, "To establish a *Brady* violation, defendant must show the evidence was favorable, material, and would have affected the outcome of the trial." *State v. Elliott*, 360 N.C. 400, 415, 628 S.E.2d 735, 746, *cert. denied*, ___ U.S. ___, 166 L. Ed. 2d 378 (2006). Here, had the State disclosed the unsuccessful fingerprint test earlier, the outcome of the trial would not have been affected. The jury was informed that fingerprint analysis had been attempted on the recovered firearm and that no fingerprints were found.

Defendant argues that if the State had disclosed the unsuccessful fingerprint test, defense counsel could have been better prepared by having his own experts examine and test the gun. This Court addressed a similar argument in *State v. Hodge*, 118 N.C. App. 655, 456 S.E.2d 855 (1995).

In *Hodge*, the State failed to disclose an unsuccessful fingerprint analysis on a bottle. 118 N.C. at 657, 456 S.E.2d at 857. The defendant argued if the unsuccessful test had been disclosed, he could have had his own experts examine the bottle. *Id.* This Court concluded the defendant failed to meet his burden under *Brady* because the "defendant was notified of the existence of the bottle and was free to conduct his own tests independent from any tests attempted by the State." *Id.* The rationale in *Hodge* applies to this case. Defendant knew the handgun had been

recovered by law enforcement authorities and was free to conduct his own tests. This assignment of error is overruled.

V. Motion for Appropriate Relief

On 31 August 2006, defendant filed with this Court a Motion for Appropriate Relief, or in the Alternative, a Motion to Remand to Superior Court. This Court has stated:

G.S. § 15A-1418(a) provides that a motion for appropriate relief on grounds found in section 15A-1415 may be made in the appellate division when a case is in the appellate division for review G.S. § 15A-1418(b) provides:

When a motion for appropriate relief is made in the appellate division, the appellate court must decide whether the motion may be determined on the basis of the materials before it, or whether it is necessary to remand the case to the trial division for taking evidence or conducting other proceedings. If the appellate court does not remand the case for proceedings on the motion, it may determine the motion in conjunction with the appeal and enter its ruling on the motion with its determination of the case.

Although the statute authorizes the appellate court to initially determine a motion for appropriate relief . . . where the materials before the appellate court . . . are insufficient to justify a ruling, the motion must be remanded to the trial court for the taking of evidence and a determination of the motion[.]

State v. Thornton, 158 N.C. App. 645, 653-54, 582 S.E.2d 308, 313 (2003) (internal citations and quotation omitted).

Defendant alleges: (1) he was denied effective assistance of counsel because defense counsel failed to adequately prepare for trial and (2) newly discovered evidence is of such a nature as to

show that a different result will probably be reached at another trial.

A. Ineffective Assistance of Counsel

Defendant alleges defense counsel failed to adequately prepare for trial by not interviewing Gore, the victim.

State v. Braswell provides a two-part test to determine ineffective assistance of counsel claims. 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985).

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698.

Although [N.C. Gen. Stat. § 15A-1418] authorizes the appellate court to initially determine a motion for appropriate relief, . . . where the materials before the appellate court . . . are insufficient to justify a ruling, the motion must be remanded to the trial court for the taking of evidence and a determination of the motion[.]

Thornton, 158 N.C. App. at 654, 582 S.E.2d at 313.

B. Newly Discovered Evidence

_____Defendant also seeks appropriate relief in the form of a new trial on the grounds of newly discovered evidence. Defendant alleges there is a newly discovered eye witness whose account of what transpired did not surface until after his trial and who is prepared to testify that he did not use or possess a weapon during his fight with Gore. Defendant argues this testimony is especially exculpatory because the witness is allegedly a disinterested witness.

"Under N.C. Gen. Stat. Sec. 15A-1415 . . . , a defendant may seek appropriate relief by motion at any time after the entry of judgment based on newly discovered evidence." *State v. Oakley*, 75 N.C. App. 99, 101, 330 S.E.2d 59, 61 (1985). Our Supreme Court has stated:

[T]he prerequisites for a new trial on the grounds of newly discovered evidence are as follows:

1. That the witness or witnesses will give the newly discovered evidence.
2. That such newly discovered evidence is probably true.
3. That it is competent, material and relevant.
4. That due diligence was used and proper means were employed to procure the testimony at the trial.
5. That the newly discovered evidence is not merely cumulative.
6. That it does not tend only to contradict a former witness or to impeach or discredit him.
7. That it is of such a nature as to show that on another trial a different result will

probably be reached and that the right will prevail.

State v. Cronin, 299 N.C. 229, 243-44, 262 S.E.2d 277, 286 (1980) (quoting *State v. Casey*, 201 N.C. 620, 624-25, 161 S.E. 81, 83-84 (1931) (citations omitted)).

Although [N.C. Gen. Stat. § 15A-1418] authorizes the appellate court to initially determine a motion for appropriate relief, . . . where the materials before the appellate court . . . are insufficient to justify a ruling, the motion must be remanded to the trial court for the taking of evidence and a determination of the motion[.]

Thornton, 158 N.C. App. at 654, 582 S.E.2d at 313.

Here, the record is insufficient for us to review and rule on defendant's ineffective assistance of counsel claim or his request for a new trial based upon newly discovered evidence. The transcripts and record on appeal are insufficient for us to determine whether defense counsel's decision to not interview Gore resulted from trial tactics and strategy or from a lack of preparation or an unfamiliarity with the legal issues. The transcripts and records are insufficient for us to determine whether defense counsel's actions prejudiced defendant's defense. We decline to reach defendant's ineffective assistance of counsel assignment of error because the record is inadequate at this stage of review.

The transcripts and record are also insufficient for us to determine whether defendant's newly acquired evidence meets the prerequisites set out in *Cronin*. An evidentiary hearing is required to determine if defendant's newly discovered evidence

warrants a new trial. Defendant's motion for appropriate relief for ineffective assistance of counsel and newly discovered evidence are remanded to the trial court.

VI. Conclusion

The trial court did not err by denying defendant's motion to dismiss. The State presented sufficient evidence to prove defendant possessed a firearm. Defendant's due process rights, set forth in *Brady*, 373 U.S. 83, 10 L. Ed. 2d 215, were not violated when the State failed to disclose unsuccessful fingerprint testing.

The record on appeal is insufficient for us to rule on defendant's motion for appropriate relief and those matters are remanded to the trial court for an evidentiary hearing. We find no error at trial.

No Error. Motion for Appropriate Relief Remanded.

Judges ELMORE and GEER concur.

Report per Rule 30(e).